IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
APPEAL FROM ORDER NO.179 OF 2006
WITH
CIVIL APPLICATION NO.252 OF 2006

Bombay Isle Developers Pvt. Ltd. ...Appellant
Vs.
Kamladevi Jagdish Diwan & Anr. ...Respondent

Mr M.P. Rao with Mr. N. Engineer i/by R.M.G. Law Associates for the Appellant.
Mr Pooniwalla i/by Yatin R. Shah for the Respondent.

CORAM : A. M.KHANWILKAR, J.
DATE : MARCH 16, 2006.

P.C.:

1. Heard the counsel appearing for the parties.

Perused the materials placed on record. This Appeal by the original Defendant No.1 takes exception to the Judgment and Order passed by the City Civil Judge dated 02nd March, 2006 in Notice of Motion No.3454 of 2005 in L.C. Suit No.3105 of 2005. By this impugned order, Trial Court has dismissed the Notice of Motion taken out by the Defendant No.1 for referring the matter to Arbitration in terms of the provisions of Section 8 of the Arbitration and Conciliation Act, 1966. The Trial Court has in the first place found that several issues have been raised in the suit which cannot be adjudicated in arbitration proceedings. Besides, the cause of action for instituting the suit against the other Defendants who are not party to the Arbitration agreement is inseparable. On that finding, relying on the decision of the Apex Court in

Sukanya Holdings Pvt. Ltd. Vs. Jayesh H. Pandya & Anr. reported in 2003(3) ALL MR 325 (S.C.) it is held that the cause being inseparable the claim in the Notice of Motion cannot be accepted. This is the limited issue for my consideration.

2. According to the counsel for the Appellant the plaint has been drafted with such dexterity so as to persuade the court to hold that the issues raised therein cannot be tried in the Arbitration proceedings. It is submitted that the suit claim is essentially dependent on the substantive relief in terms of prayer clause (a) and that is an issue which can be considered in arbitration proceedings between the Plaintiff and the Defendant No.1. It is contended on behalf of the Appellant that relief claimed against the Defendant No.2- Corporation is also dependent on the relief in terms of prayer clause (a). In such a case contends learned Counsel, the parties will have to be first allowed to resolve the issues which are governed by the arbitration agreement between the Plaintiff and the Defendant No.1. Counsel for the Appellant referred to the decision of the Apex Court in case of P.Anand Gajapathi Raju Vs. P.V.G.Raju reported in AIR 2000 Supreme Court 1886 as well as another decision in the case of Padmasundara Rao (Dead) & Ors. Vs. State of Tamil Nadu & Ors.

reported in Judgments Today 2002 (3) S.C. 1. Counsel appearing for the Appellant has made an attempt to distinguish the judgment of the Supreme Court in Sukanya's case (supra) relied upon by the Trial Court.

3. Before I proceed to consider the above submissions, it will be apposite to advert to the reliefs claimed in the subject suit. The same read thus:

"(a) that it may declared that the Plaintiff having already terminated the development agreement dated 31.10.2001 with the Defendant No.1, the Defendant No.1 are not entitled to carry out any further work of construction in the suit building being building known as Kamal Vishranti Kutir of Ground + 2 storied building standing on Plot No.140-D, Bandra T.P.S. III bearing City Survey No.F/405-A, Village Bandra.

(b) that it may be declared by this honourable court, that the Commencement Certificate dated 04.06.2005 issued by the Defendant No.2 to the Defendant no.1 is illegal, ultraviers the Intimation of Disapproval conditions, bad in law and is liable to be revoked and cancelled by the Bombay Municipal Corporation.

(c) that it may be declared that the plans of the Defendant NO.1 sanctioned by the Defendant No.2 dated 27.05.2002 and 25.02.2005 are

ultravires and per se not in accordance with the Development agreement dated 31.10.2001, as the said plans are fraudulent and not in consultation with the plaintiff and the said plans are liable to be revoked forthwith by the Defendant No.2.

(d) that the Defendant No.1, their servants, agents and all persons claiming through them may be restrained by a permanent order and injunction of this honourable court from loading additional construction over the existing suit building being building known as Kamal Vishranti Kutir of Ground + 2 storied building standing on Plot No.104-D, Bandra T.P.S.III bearing City Survey No.F/405-A, Village Bandra, pursuant to the sanctioned plan dated 27.05.2002 and 25.02.2005 and the commencement certificate dated 04.06.2005.

(e) that the Defendant No.1, their servants, agents and all persons claiming through them may be restrained by a permanent injunction from demolishing the existing garages in the compound of the suit building being two garages in the compound i.e. Northern Garage of the plaintiff and the Southern Garage of Dr. Advani standing on Plot No.104-D, Bandra T.P.S. III bearing City Survey No.F/405-A, Village Bandra.

(f) that this honourable court may be pleased to issue a order and direction to the Defendant No.2 to issue a stop work notice to the Defendant No.1 for not complying with the

Intimation of Disapproval conditions as specified in Intimation of Disapproval dated 27.05.2002 and to forthwith cancel and revoke the Commencement Certificate dated 04.06.2005 issued in favour of the Defendant No.1 and further may be directed by this honourable court not to issue any further commencement certificate in favour of the Defendant NO.1.

(g) that pending the hearing and final disposal of the suit, the Defendant No.1 their servants, agents and all persons claiming through them may be restrained by a temporary order and injunction of this honourable court from loading additional construction over the existing suit building being building known as Kamal Vishranti Kutir of Ground + 2 storied building standing on Plot No.104-D, Bandra T.P.S.III bearing City Survey No.F/405-A, village Bandra, pursuant to the sanctioned plan dated 27.05.2002 and 25.02.2005 and the commencement certificate dated 04.06.2005.

(h) that pending the hearing and final disposal of the suit the Defendant No.1 their servants, agents and all persons claiming through them may be restrained by a temporary injunction from demolishing the existing garages in the compound of the suit building being two garages in the compound i.e. Northern Garage of the Plaintiff and the Southern Garage of Dr. Advani standing on Plot NO.104-D, Bandra T.P.S.III bearing City Survey No.F/405-A, Village Bandra building.

(i) that pending the hearing and final disposal of the suit this honourable court may be placed to issue a interim order and direction to the Defendant No.2 to issue a stop work notice to the Defendant No.1 for not complying with the Intimation of Disapproval conditions as specified in Intimation of Disapproval dated 27.05.2002 and to forthwith cancel and revoke the Commencement Certificate dated 04.06.2005 issued in favour of the defendant NO.1 and further the honourable court may be pleased to issue a interim order against the Defendant No.2 not to issue any further Commencement Certificate in favour of the Defendant No.1.

(j) ad-interim reliefs in terms of prayers (g), (h) and (i) above.

(k) for such other and other further reliefs as the nature and circumstances of this case may require.

(l) costs and professional costs of this suit may be provided for."

4. Having considered the rival submissions, I have no hesitation in taking the view that this Appeal is devoid of merits. I am in agreement with the conclusion reached by the Trial Court that all the issues raised in the plaint are not governed by the arbitration agreement between the Plaintiff and the Defendant No.1; and that the cause of action for instituting the suit against Defendant No.2-

Corporation who is not party to the Arbitration agreement is inseparable.

5. The Respondent has rightly invited my attention to the averments in paragraph No.37 onwards of the plaint to contend that the Respondent-Plaintiff had no option but to rush to the court. According to the plaintiff although the development agreement dated 31st October, 2001 was terminated by the plaintiff, the Appellant continued with the development activity unabated. As a consequence, the Plaintiff had no option but in the first place to rush to the municipal authority. Initially, some response was given by the officers of the municipal authority but the Appellant continued with the construction activity after obtaining commencement certificate. In my opinion, there is substance in the grievance made by the Plaintiff that in such a situation, the Respondent-Plaintiff had no other option but to rush to the Civil Court so as to seek appropriate direction also against the municipal authority directing it to abjure from issuing any permission or allowing the Appellant-Defendant to continue with the construction activity for the reasons noted in the plaint.

6. Assuming that the Appellant is justified in contending that the relief claimed in prayer (c) to

(e) are dependent on the outcome of the decision on relief claimed in prayer clause (a) which is amenable to arbitration proceedings. However, for the nature of the entire controversy in the plaint, the plaintiff had no option but to invoke the jurisdiction of the Civil Court so as to seek appropriate relief even against the Defendant No.2-municipal authority. In any case my understanding of the plaintiff's case in relation to relief in terms of prayer clauses (b) and (f) claimed in the plaint, the same cannot be considered in arbitration proceedings. The same is in respect of not complying with the conditions of the I.O.D. and inspite of that commencement certificate is issued by the Corporation, as a consequence the Appellant started construction activities. In the background of that allegation the plaintiff has sought relief against the Defendant No.2 to issue stop work notice to the Appellant and also to cancel and revoke the commencement certificate issued in favour of the Appellant-Defendant No.1. The said relief by no stretch of imagination can be considered in arbitration proceedings. The decision in the case of Sukanya in my opinion, squarely covers the controversy on hand. In that decision, the Apex Court has taken a view that there is no provision for "splitting the cause" or "parties" and referring the subject matter of the suit to the arbitrator. In other words, as the

relief in terms of prayer clauses (b) and (f) is outside the scope of arbitration agreement and inseparable, the course suggested by the Appellant cannot be acceded to. For, in paragraph No.17 of the decision in the case of Sukanaya, it is observed that such bifurcation of suit in two parts, one to be decided by the arbitral tribunal and other to be decided by the civil Court would inevitably delay the proceedings. The whole purpose of speedy disposal of dispute and decreasing the cost of litigation would be frustrated by such procedure. It would also increase the cost of litigation and harassment to the parties and on occasions there is possibility of conflicting judgments and orders by two different forums.

7. That takes me to the two decisions relied upon by the Appellant. The first is the case of P. Anand Gajapathi Raju (Supra). In that case, during the pendency of the appeal "all the parties" entered into an arbitration agreement and agreed to refer their disputes in the appeal to a sole arbitrator. The Apex Court in para 6 of the reported decision observed that: it is not necessary that the arbitration agreement must be already in existence before the action is brought in the court but also include an agreement brought into existence while the action is pending. This exposition has no application to the

case on hand. Indeed, in paragraph No.5 of the same decision the court has spelt out the conditions which are required to be satisfied under section 8 of the Act before the Court can exercise its powers to refer the parties to arbitration. One of the condition is that the subject matter of the action is the same as the subject matter of the arbitration agreement. However, in the earlier part of this judgment I have affirmed the conclusion of the trial Court that the suit pertains to a matter which is outside the arbitration agreement and inseperable. Viewed thus, this decision is of no avail. The next decision pressed into service is in the case of Padmasundara (supra). That however, deals with the principles of construction of statute. Even this decision is of no avail to the Appellant.

8. Hence, the Appeal is dismissed. In view of this Order Civil Application is also disposed of.

9. It is made clear that none of the observations made in this order be construed as expression of opinion or finding on the issues that are still pending or under consideration before the Trial Court. Trial Court will decide the proceedings before it on its own merit uninfluenced by this decision.

JUDGE